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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 694

COLONIAL REFRIGERATED TRANSPORTATION, INC.
et al.,
Appellants,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

JURISDICTIONAL STATEMENT

[redacted]

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a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Alabama, Southern Division (Three Judge Court), is not reported, but is set forth in Appendix A, *infra*. The order of the Court based upon said opinion is set forth in Appendix B, *infra*.

JURISDICTION.

Suit was brought by Colonial Refrigerated Transportation, Inc., a corporation (hereinafter at times referred to as "Colonial" or "appellant"), against the United States of America and the Interstate Commerce Commission (hereinafter at times referred to as "ICC" or "Commission"), under the provisions of Sections 17 (9), 205 (g) and 205 (h) of the Interstate Commerce Act [Title 49, U. S. C. A., §§ 17 (9), 305 (g) and 305 (h)], Section 10 of the Administrative Procedure Act (Title 5, U. S. C. A., § 1009), and Title 28, U. S. C. A., §§ 1336, 1398, 2284 and 2321 to 2325, inclusive (Judicial Code), for review of, and to enjoin, set aside and annul certain decisions and orders of the ICC in its Docket MC-115841 (Sub-No. 48), in which Colonial is the applicant. Under the provisions of Title 28, U. S. C. A., § 2284, and § 2325, this action was required to be heard and determined by a district court of three judges, and was heard and determined by such a three judge district court comprised of Circuit Judge Walter P. Gewin and District Judges Seybourn H. Lynne and H. H. Grooms.

The final judgment of the District Court in this case, of which review is sought, was entered on June 27, 1966. Notice of appeal, and appeal bond and security for costs, was filed by Colonial in the United States District Court for the Northern District of Alabama, Southern Division, on August 25, 1966. By order entered in the District Court on October 19, 1966, the time for docketing this case in the Supreme Court was extended to and including December 23, 1966.

Under the provisions of Title 28, U. S. C. A., § 1253, an appeal may be taken to the Supreme Court in any civil action "required by an Act of Congress to be heard and determined by a district court of three judges".

QUESTIONS PRESENTED.

Colonial filed an application with the Interstate Commerce Commission under Section 7 (c) of the Transportation Act of 1958[1] ("grandfather" clause thereof) to continue in the transportation for hire of various commodities, the transportation of which was, prior to the effective date of the Transportation Act of 1958, exempt from regulation by the Interstate Commerce Commission under Section 203 (B) (6) of the Interstate Commerce Act. Limited authority was granted to Colonial by the Commission, but the operation authorized thereby is not in substantial parity with the operations conducted by Colonial in the transportation of the previously exempt commodities prior to the effective date of the Transportation Act of 1958. The ultimate question presented, of course, is whether the District Court erred in finding as a matter of law that "the orders of the Commission, delineating the scope of 'grandfather' authority to which plaintiff (appellant) was entitled, are in accord with the applicable law and supported by substantial evidence of record", and that the appeal of Colonial should be dismissed. This ultimate question is presented by the following specific questions which are involved in this case:

1. May the Interstate Commerce Commission decide an application for a certificate under the "grandfather" clause of the Transportation Act of 1958 within such a restrictive framework as to preclude the applicant therefor from providing service other than between specific points served both before and after May 1, 1958, the date named in the Act as the date on which an applicant must have been in *bona fide* operation to be entitled to authority?

2. May the Interstate Commerce Commission apply a numerical or "tabulator" standard of consideration by

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[1] Public Law 85-625, 85th Congress, Second Session, Effective August 12, 1958, 72 Stat. 573.

basing its grant of authority under the "grandfather" clause of the Transportation Act of 1958 upon a consideration of those specific points served before and after May 1, 1958 (the critical date), so as to preclude an applicant for such "grandfather" certificates from continuing to serve areas and terrritories served by it prior to the effective date of the Transportation Act of 1958?

3. May the Interstate Commerce Commission atomize the authority granted to an applicant for a "grandfather" certificate under the Transportation Act of 1958 by granting authority to transport only frozen fruits, or frozen berries, or frozen vegetables, or a combination of two of them, without regarding "frozen fruits, frozen berries, and frozen vegetables" as a single class of commodities?

4. May the Interstate Commerce Commission decide cases and issue authority under the "grandfather" clause (§ 7 (c)), of the Transportation Act of 1958 within a more restrictive framework than that adopted by the Commission for the decision of similar applications under the "grandfather" clause of the Motor Carrier Act of 1935 (Interstate Commerce Act, § 206)?

5. May the Interstate Commerce Commission grant broader authority to some applicants for "grandfather" certificates under Section 7 (c) of the Transportation Act of 1958, than to Colonial, where the facts and circumstances involved in such cases are substantially similar to the facts and circumstances involved in the Colonial case?

6. May the Interstate Commerce Commission refuse to consider that an applicant for "grandfather" authority under Section 7 (c) of the Transportation Act of 1958 was, on May 1, 1958 (the critical date), serving certain origin and destination territories lying in more than one state as single territories, in transportation of commodities made subject to regulation, for the first time, by such Act?

7. May the Interstate Commerce Commission grant to an applicant for a "'grandfather" certificate under Section 7 (c) of the Transportation Act of 1958, authority only to serve specific points within an area comprised of more than one contiguous state, or part thereof, when such applicant was serving such area so comprised as a single territory on May 1, 1958 (the critical date)?

8. May the Interstate Commerce Commission base a grant of authority to an applicant under Section 7 (c) of the Transportation Act of 1958, upon a consideration of states and political subdivisions thereof served by such applicant before and after May 1, 1958 (the critical date), when such applicant's operations to or from such states and political subdivisions thereof were territorial in character with such territory being comprised of more than one state or part thereof?

9. May the Interstate Commerce Commission refuse, under Section 7 (c) of the Transportation Act of 1958, to authorize a carrier to continue to conduct operations in the transportation of commodities made subject to regulation by the Transportation Act of 1958, in substantial parity with operations conducted by such carrier in the transportation of such commodities before the transportation thereof was subject to regulation?

10. May the Interstate Commerce Commission ignore the fact that the transportation of frozen fruits, frozen vegetables, and frozen berries, which transportation was regulated for the first time by the Transportation Act of 1958, is specialized transportation service requiring authority to serve broad origin and destination territories, under historically established policies of the Commission?

STATEMENT OF THE CASE.

Colonial is a motor common carrier specializing in the transportation of frozen and perishable foodstuffs (12).[2] It is, and has been for many years, engaged in the transportation of both regulated and exempt commodities (12). In 1956, Colonial issued exempt tariffs applying to the transportation of frozen fruits, vegetables and berries, with the last such tariff issued by Colonial having become effective April 15, 1958. Colonial held itself out, at all times prior to the effective date of the Transportation Act of 1958, to provide service in the transportation of frozen fruits, frozen vegetables and frozen berries within the United States without territorial limitation. The exempt tariff governing the transportation of such commodities by Colonial is on a mileage basis with mileages ranging from 5 to 3,000 (16-17). During 1956, 1957, 1958 and 1959, Colonial transported between 15,000 and 20,000 shipments of the involved commodities between points in the United States (17-18).

On December 8, 1958, Colonial filed an application for certificate of public convenience and necessity under the provisions of Section 7 (c) of the Transportation Act of 1958. In that application, Colonial sought authority to continue to operate in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, frozen vegetables, coffee beans, and bananas in straight loads and in mixed loads with frozen seafoods and frozen poultry.

An oral hearing was held before an ICC hearing examiner on June 20, 1960, at Birmingham, Alabama. By

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[2] Numerals in parentheses herein refer to pages of the official stenographer's minutes or transcript of testimony of the hearing held before the Interstate Commerce Commission in this matter, unless there is an indication to the contrary.

recommended Report and Order served January 6, 1961, the examiner recommended that Colonial be granted extremely limited point to point authority for the transportation of the involved commodities. Exceptions were duly filed by Colonial, and the Commission, Division 1, in an Order served August 1, 1961, somewhat broadened the scope of authority to be granted to applicant, but basically followed an extremely restrictive policy in the decision of the case.

Colonial filed a timely petition seeking reconsideration of the order of Division 1 served August 1, 1961, which was denied by the same Division by order served November 2, 1961. By November 2, 1961, several cases were pending in the federal courts wherein grandfather applicants under the Transportation Act of 1956 sought judicial review of the restrictive and fragmented grants of authority accorded them by the Commission under Section 7 (c). On November 18, 1963, after the case of **Wintergarden Company, Inc. v. U. S. and I. C. C.**, 211 F. Supp. 280, was decided favorably to the plaintiff (applicant), and the case remanded to the Commission, Colonial filed a further petition for reconsideration, rehearing and reopening of the instant case, but this petition was denied by summary order of Division 1 served March 10, 1964.

Following the decision of this court in the case of **Willis Shaw Frozen Express, Inc. v. U. S. and I. C. C.**, 377 U. S. 159, 12 L. Ed. 2d 211, which was also decided favorably to the plaintiff-appellant (applicant), and the case remanded to the Commission, Colonial filed a further petition for reconsideration which was also denied by a summary order of Division 1 served September 16, 1964.

Colonial then filed a complaint in the United States District Court for the Northern District of Alabama, Southern Division, against the United States and the ICC, seeking judicial review of the restrictive manner in which

the Commission has determined its "grandfather" case under the Transportation Act of 1958, and to enjoin, set aside and annul decisions and orders of the ICC entered in the matter. After the filing of this case, by an order served December 16, 1964, the Commission, on its own motion, reopened the proceeding and, with the consent of the parties, the District Court stayed the case pending further proceedings before the ICC. Pursuant to the order of the Commission served December 16, 1964, Colonial filed a detailed petition for reconsideration specifying the additional authority not granted in the order of Division 1 served August 1, 1961, to which it is entitled. No reply to this petition was filed by any party. On reconsideration, Division 1, acting as an appellate division, with Commissioner Brown dissenting, issued an order served August 19, 1965, which somewhat broadened the scope of authority issued to Colonial. Nonetheless, the case was still decided by Division 1 within a most limited, restrictive and arbitrary framework.

Further petition for reconsideration was filed by Colonial on September 30, 1965. As was the case with the previous petition, no reply was filed thereto by any party. This petition was substantially denied by an order of Division 1 served December 10, 1965. The only change effected by the order served December 10, 1965, was to correct certain clerical errors and oversights in the order served August 19, 1965.

After denial of this petition for reconsideration, Colonial filed an amendment to its complaint in the District Court to reflect the status of the proceeding after its having been reopened and reconsidered by the Commission. The matter was submitted to the Court upon briefs and oral argument, and proceeded to final judgment as set out in Appendix B. The District Court correctly found that the proceedings before the Commission had become administratively final (Appendix A, p. 26).

Because of the vast number of shipments of the involved commodities handled by Colonial, before the transportation of such commodities was subject to regulation, a random sampling of shipping documents was selected by Colonial from which to prepare exhibits for presentation at the hearing before the Commission (18-19). The shipments reflected by the shipping documents so selected were listed on Exhibits 3 through 13 presented at such hearing, and collectively list between 2300 and 2500 shipments. In addition, Colonial prepared lists of numerous additional shipments which were attached to its petition for reconsideration filed February 23, 1965 as Appendices XIV-A through XXI thereto. Evidence of these additional shipments was accepted in evidence by the Commission and nominatively considered. At page 5 of the Order of Division 1 served August 19, 1965, the following appears:

> "Appendix B is an analysis of the shipments set forth in the petition, indicating by asterisks discrepancies with the present record. Shipments shown in the petition to have been transported by applicant, but not in the present record, have been considered in determining the extent of additional authority to be granted herein.
>
> While no one has replied to the petition for reconsideration, should any party believe it has been prejudiced by consideration of such additional evidence, it may file an appropriate pleading setting forth its position."

No such pleading was filed by any party.

On May 1, 1958 (the date named in Section 7 (c) of the Transportation Act of 1958 as the date on which a carrier must have been engaged in transportation of the heretofore unregulated commodities, to be entitled to a "grandfather" certificate), Colonial was extensively engaged in the transportation of the involved commodities between

broad origin and destination areas in the United States. Approximately 40% of Colonial's total traffic was of shipments of such commodities (14).

As required in the provision of a specialized irregular route common carrier service, Colonial's operations in the transportation of the involved commodities were territorial in character. It served the entire middle Atlantic area, comprised of the States of New Jersey, Pennsylvania, Maryand, Delaware, Virginia, West Virginia and the District of Columbia, being basically that production area within a 185 mile radius of Baltimore, Maryland, as a single origin territory. That Colonial served the middle Atlantic area as a single origin territory is confirmed by the fact that Colonial originated numerous shipments at points within one state in the area, with stop offs in transit for partial loading in another state within the area. Similarly, Colonial's operations were territorial in character from an origin area comprised of the States of Arkansas and Tennessee; that portion of New England comprised of the State of Maine, and Boston, Massachusetts, the nearest large city; the entire State of Texas; and other areas. Colonial also served destination areas consisting of more than one state or parts thereof from various origin areas, such as the States of Tennessee and North Carolina; the States of Michigan, Indiana and Illinois; the States of Mississippi and Louisiana; and the States of North Carolina and South Carolina. By authorizing Colonial to originate shipments only at certain points within its various origin areas, or from areas comprised of only part of the area served by Colonial as an origin area, destined to specific points within its destination territories, or to areas comprised of only part of its destination territories, the Commission has ignored the territorial character of Colonial's operations. Colonial is thus precluded from providing multiple stops in transit for partial loading within its origin areas, or multiple

stops for partial delivery within its destination areas. The conduct of a feasible and practical operation pursuant to the limited authority granted by the Commission to Colonial is virtually impossible because of the limited origin and destination points and areas authorized to be served.

The Commission not only disregarded the fact that Colonial served broad origin and destination territories before the transportation of commodities involved was subject to regulation, but in several instances the Commission failed to grant Colonial authority to continue to operate between points served by it both before and after May 1, 1958.

To further restrict the operations which Colonial may conduct pursuant to the authority granted to it by the Commission under Section 7 (c) of the Transportation Act of 1958, the Commission, in several instances, granted Colonial authority to transport only frozen fruits, or frozen berries, or frozen vegetables, or a combination of two of them. This ignores the logical intent of Congress that "frozen fruits, frozen vegetables and frozen berries" be regarded as a class of property having almost identical characteristics, and requiring an identical type of transportation service.

THE QUESTIONS ARE SUBSTANTIAL.

Prior to the enactment of the Transportation Act of 1958, the transportation of certain agricultural commodities in interstate commerce, including frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea and bananas, was exempt from regulation by the ICC under Section 203 (b) (6) of the Interstate Commerce Act, if the motor vehicles used in the transportation thereof were not used in providing any transportation

service which was subject to regulation. Section 7 (a) of the Transportation Act of 1958, however, specifically excluded these and other commodities from the exemption of Section 203 (b) (6). In recognition of the fact that numerous carriers had made substantial investments in vehicular equipment, material handling facilities, and administrative facilities for use in the furnishing of transportation for hire of the previously exempt commodities, Congress added to the Transportation Act of 1958 a "grandfather" clause which is Section 7 (c) thereof and reads:

> "Subject to the provisions of Section 210 of the Interstate Commerce Act[4], if any person (or its predecessor in interest) was in *bona fide* operation on May 1, 1958, over any route or routes or within any territory in the transportation of property for compensation by motor vehicle made subject to the provisions of Part II of the Act by paragraph (a) of this section in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time) except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in Part II of the Interstate Commerce Act and within 120 days after the date on which this section takes effect. . . ."

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[4] Section 210 relates to dual operation of separate classes of motor carriers.

This so-called "grandfather" clause is worded similarly in all material respects to the corresponding clause in Section 206 of the Act (Title 49, U. S. Code, § 306), the basic motor carrier regulatory statute.

The obvious intent of Congress in the enactment of Section 7 (e) of the Transportation Act of 1958, just as was the case in the enactment of the "grandfather" provision of Section 206 of the Act, was that those carriers which had, prior to the enactment of the statute removing the exemption, engaged in the transportation of the theretofore exempt commodities in interstate commerce, should have a certificate of public convenience and necessity authorizing operations in substantial parity with the operations conducted prior to the advent of regulation.

Numerous motor carriers, including Colonial, who had been transporting the previously exempt commodities, filed "grandfather" applications for such certificates to enable them to continue in the transportation business to the same extent as they had engaged prior to the effective date of the Transportation Act of 1958. In considering these applications, the Commission initially adopted a most restrictive policy, limiting the applicants to certificates reflecting actual point-to-point operations which had been conducted both before and after May 1, 1958. After considerable litigation and under the direction of this Court, and the Federal District Courts, the Commission has relaxed its view somewhat, but still adheres to a much more restrictive policy than was followed by it in the consideration of "grandfather" applications under Section 206 of the Interstate Commerce Act. The effect of this restrictive policy is to deny to Colonial the right to continue to conduct operations in the transportation of the previously exempt commodities in substantial parity with the operations conducted by it in the transportation thereof before such transportation was regulated by the Transportation Act of 1958.

This case presents the substantial question of whether the Interstate Commerce Commission may arbitrarily abandon a policy of liberality for the decision of cases presented under "grandfather" clauses of various transportation regulatory acts. Such a policy of liberality was promulgated by the Commission in the case of **Cassens & Sons**, 1 M. C. C. 771, 774, which was one of the first motor carrier cases presented to the Commission under the "grandfather" clause of the Motor Carrier Act of 1935. In that case, the Commission said:

> "It was not the intent of Congress that a carrier must have been in physical operation to all points to which it claims to have rendered service, on the exact date specified in the statute. If such were the intent and purpose of the 'grandfather' provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date. **A more appropriate view of the application of the 'grandfather' clause date is that a carrier is entitled to claim the territory or the points to which it might reasonably have served by reason of its operations prior to, as well as on, the statutory date, and subsequent thereto.**" (Emphasis supplied.)

The wisdom of this view was confirmed by the mandate of this Court in the case of **United States et al. v. Carolina Freight Carriers Corporation**, 315 U. S. 475, 86 L. Ed. 971, 982 (1941), in which is was held:

> "The restriction in this case of the commodities which may be carried from any one point on southbound trips is a patent denial to appellee of that 'substantial parity between future operations and

prior *bona fide* operations' which the Act contemplates. Alton R. Company v. United States, 315 U. S. 15, 62 S. Ct. 432, *supra*. Its prior opportunity should not be restricted beyond the clear requirements of the statute. **For this act should be liberally construed to preserve the position which those like appellee have struggled to maintain in our national transportation system.** To freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights.'' (Emphasis supplied.)

The first case presented to the Supreme Court under the "grandfather" clause of the Transportation Act of 1958 was that of **Willis Shaw Frozen Express, Inc. v. U. S. et al.**, 377 U. S. 159, 12 L. Ed. 2d 211, 84 S. Ct. 1154 (1964). The failure of the Commission to adhere to its own time honored and judicially sanctioned concept of liberality in the construction of "grandfather" provisions lead this Court to remand the **Willis Shaw** case to the Commission for further consideration.

Of equal substantiality and importance is the question presented by this appeal whether the Commission may arbitrarily refuse to regard certain areas served by Colonial as single territories. To do so is without reasonable basis, and had the Commission considered the several territories served by Colonial as complete units, the authority granted would have been much broader than that which actually resulted. This question was presented to the United States District Court of Maryland in the case of **Jarman v. U. S. et al.**, 219 Fed. Supp. 108, 116 (1963), which was also an appeal from the action of the Commission in deciding an application under the "grandfather" clause of the Transportation Act of 1958 within a restrictive, tight-fisted framework. The Court there held, on

the basis of the decision of the Supreme Court in **Alton R. Company v. U. S.**, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586 (1942):

> "We agree with the plaintiff's contention that to base destination authority, as the Commission apparently has, on a point-to-point analysis of shipments from each separate shipping point used in Maryland and Delaware is simply a fresh application of the pulverization forbidden by Carolina (Carolina Freight Carriers Corporation v. U. S., *supra*) long ago in a different factual situation."

After the decision in the **Jarman** case, the Commission recognized the necessity for considering the territorial character of a carrier's operation in the transportation of commodities which were formerly exempt, in the case of **Watkins Motor Lines, Common Carrier Grandfather Application**, 99 M. C. C. 209.

This case also presents the substantial inquiry of whether the Commission may reduce its consideration of "grandfather" applications under Section 7 (c) of the Transportation Act of 1958 to a numerical or tabulator-like consideration of whether shipments were handled from and to specific origin and destination points before and after the critical date. Commissioner Brown, in her dissent from the opinion of the majority in **Frozen Food Express, Common Carrier "Grandfather" Application**, MC-108207 (Sub-No. 60), 15 F. C. C., ¶ 35,898, which was concurred in by Commissioner (Chairman) Webb, stated:

> "I have dissented from the Commission's Reports in a number of these 'grandfather' applications. My observations there lead me to believe that the Commission suffered from administrative myopia. However, I am now convinced that the Commission's policy has far-reaching implications. With each application I see the whole concept of the 'grandfather'

statute continually emasculated under guise of efficient administration. Standards are over simplified for the easy way out. Yet the fact that these cases have gone through all this court litigation ought to be convincing enough that the general problem has no easy solution. It takes more than a tabulator to reach the right conclusion. For the tabulator fails to account for the judgment factor."

The tabulator approach was condemned by United States District Courts in the cases of **Jarman v. United States, et al.**, *supra*, and **Wintergarden Company v. U. S., et al.**, 211 F. Supp. 280 (U. S. D. C., Tennessee 1962), and finally abandoned by the Commission in the case of **W. W. Hughes "Grandfather" Application**, 100 M. C. C. 386. Yet, the authority granted to Colonial by the Commission is based largely upon the arbitrary, erroneous and oversimplified consideration of whether Colonial had served certain points both before and after May 1, 1958.

This case also directly presents the question of whether the Commission may thwart the intent of Congress by authorizing an applicant under Section 7 (c) of the Transportation Act of 1958, to transport only frozen fruits, or frozen vegetables, or frozen berries, or a combination of two of them, instead of the entire class of frozen fruits, frozen vegetables and frozen berries. There is no rational basis upon which to base the Commission's determination that Colonial, on May 1, 1958, was a common carrier of frozen fruits, frozen berries and frozen vegetables from points in a designated portion of Pennsylvania, a portion of Maryland, and Seabrook, New Jersey, but that it was a common carrier only of frozen vegetables from nearby Philadelphia, Pennsylvania, and Bridgeville and Houston, Delaware; or that it was a common carrier of frozen fruits, frozen berries and frozen vegetables from all points in Tennessee to (among others) all points in Alabama and Little Rock, Arkansas on the critical date, but that it was

a common carrier only of frozen vegetables from Searcy, Arkansas, and only frozen fruits and frozen vegetables from Birmingham, Alabama. This precise sort of unwarranted atomization was presented to the court in **Wintergarden Company v. United States**, 211 F. Supp. 280, 289 (U. S. D. C., Tennessee 1962), and that Court held:

> "It is our opinion that frozen fruits, frozen berries, and vegetables possess the necessary similarities in transportation and marketing characteristics and are sufficiently related to justify the conclusion that they are 'a whole class or classes of property' within the meaning of the Supreme Court's ruling in the case of United States v. Carolina Freight Carriers, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971."

Of singular importance, is the further question presented by this appeal of whether the Commission may decide the authority to be granted to Colonial within a more restrictive framework than that applied to similar cases of other carriers. Not only has the Commission decided this case in a much more restrictive manner than it viewed "grandfather" applications under the Motor Carrier Act of 1935, it has treated Colonial much more restrictively than it did similar applicants for authority under Section 7 (c) of the Transportation Act of 1958, under similar circumstances, such as the cases of **Querner Truck Lines, Inc., Common Carrier "Grandfather" Application**, 102 M. C. C. 616; **W. W. Hughes "Grandfather" Application**, 100 M. C. C. 386; and **Watkins Motor Lines, Common Carrier "Grandfather" Application**, 99 M. C. C. 209. In the case of **Dixie Highway Express, Inc. et al. v. United States and Interstate Commerce Commission**, 242 F. Supp. 1016 (U. S. D. C., Southern District, Mississippi, Eastern Division 1965), the Court summarized the law on this subject as follows:

> "The doctrine of stare decisis does not apply to decisions of administrative bodies, but consistency of

administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily."

CONCLUSION.

For the reasons stated, appellant respectfully submits that the questions presented by this appeal are so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution.

Respectfully submitted,

S. EASON BALCH,
MARTIN, BALCH, BINGHAM & HAWTHORNE,
600 North 18th Street
Birmingham, Alabama 35203,
JOHN P. CARLTON,
BISHOP & CARLTON,
327 Frank Nelson Building,
Birmingham, Alabama 35203,
Attorneys for Appellant.

December 14, 1966.

APPENDIX A.

In the United States District Court for the Northern District of Alabama, Southern Division.

Colonial Refrigerated Transportation, Inc., Plaintiff, vs. United States of America and Interstate Commerce Commission, Defendants.	Civil Action No. 64-651.

Before Gewin, Circuit Judge, and Lynne and Grooms, District Judges.

Per Curiam:

Invoking the jurisdiction of this court under the provisions of 28 U. S. C. A., sections 1336, 1398, 2284, 2321 to 2325, 49 U. S. C. A., sections 17 (9), 305 (g), 305 (h), and 5 U. S. C. A., section 1009, plaintiff brought this action to enjoin, set aside and annul decisions and orders of the Interstate Commerce Commission (Commission), entered July 21, 1961, October 17, 1961, February 28, 1964, September 9, 1964, and August 5, 1965, as modified by order of December 3, 1965, in its Docket No. MC-115841 (Sub.-No. 48), **Colonial Refrigerated Transportation, Inc., Common Carrier "Grandfather" Application.**[1] The effect of these orders was to deny in part plaintiff's application under the "grandfather" clause of the Transportation Act of 1958, section 7 (c), 49 U. S. C. A., section 303 (b)

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[1] ... M. C. C. ....

(6),[2] to transport as a common carrier over irregular routes frozen fruits, frozen berries, frozen vegetables, coffee beans, and bananas in straight loads and in mixed loads with frozen seafoods and frozen poultry from points in twenty-seven states to points in thirty-nine states and the District of Columbia.[3]

By stipulation of the parties this action was submitted upon plaintiff's prayer for final relief and upon the record made before the Commission. The limited scope of judicial review to which the parties are entitled enables us to compress the antecedent history of proceedings following the filing of such application.[4]

The Examiner recommended that plaintiff be granted severely limited point-to-point authority for the trans-

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[2] Section 7 (c) of the Transportation Act of 1958 in pertinent part provided:

> (c) Subject to the provisions of section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operations on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time * * * except * * * as to interruptions of service over which such applicant had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect.

[3] The states to and from which plaintiff sought authority are listed in the Report of the Commission on Reconsideration, p. 2, nn. 2 and 3.

[4] United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 482 (1942); Ala. G. S. Ry. v. United States, 162 F. Supp. 614, 617 (N. D. Ala. 1958); Motor Freight Express v. United States, 119 F. Supp. 298, 303 (D. Pa. 1954).

portation of the involved commodities. In an order served August 1, 1961, the Commission broadened the scope of authority to be granted,[5] but it fell far short of that

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[5] The authority granted to Colonial by the order served August 1, 1961 is to engage as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes of:

(1) Frozen berries, frozen fruits and frozen vegetables:

(A) From Exmore, Virginia to points in Ohio and to Mobile and York, Alabama, South Bend and Indianapolis, Indiana, New Orleans and Baton Rouge, Louisiana, Minneapolis, Minnesota, Jackson, Mississippi, Carnegie, Pennsylvania, Nashville, Tennessee and Charleston, West Virginia;

(B) From Holley, New York to Little Rock, Arkansas, Metairie and Shreveport, Louisiana and Charleston, South Carolina;

(C) From Baltimore, Maryland to Birmingham, Alabama and Atlanta, Georgia; and

(D) From Nashville, Tennessee to points in Alabama, Florida, Mississippi and to Little Rock, Arkansas, Atlanta, Georgia, Chicago, Illinois, Elkhart, Indiana, New Orleans and Shreveport, Louisiana, Detroit, Michigan, Butner, North Carolina, Cleveland and Cincinnati, Ohio, Philadelphia and Pittsburgh, Pennsylvania, Houston, Texas, Richmond, Virginia and Huntington, West Virginia;

(2) Frozen fruits and frozen vegetables:

(A) From Seabrook, New Jersey to points in Massachusetts, Tennessee and to Birmingham, Alabama, Little Rock, Arkansas, Chester and Hartford, Connecticut, Atlanta and Columbus, Georgia, Louisville, Kentucky, New Orleans, Louisiana, Cleveland, Ohio, Providence, Rhode Island, Burlington, Vermont and Charleston, West Virginia; and

(B) From Birmingham, Alabama to New Orleans, Louisiana and Memphis, Tennessee;

(3) Frozen berries from Frankfort, Michigan to Dallas, Texas;

(4) Frozen fruits:

(A) From Winchester, Virginia to Webster City, Iowa;

(B) From Bear Lake, Michigan to New Orleans, Louisiana and Dallas and Houston, Texas; and

(C) From Benton Harbor, Michigan to Dallas, Texas;

claimed by plaintiff. Multiple petitions for reconsideration were filed by plaintiff and denied by the Commission before the institution of this action on November 3, 1964.

In the interval between August 1, 1961 and November 3, 1964, other section 7 (c) Commission decisions were reversed by district courts which concluded that, upon the facts of those cases, the limited grants of authority were based on restrictive views concerning operations conducted prior to the critical date, May 1, 1958, and on an erroneous interpretation of the applicable law.[6] Finally, on May 4, 1964, the Supreme Court, in **Willis Shaw Exp. v. United States**, 377 U. S. 159 (1964), admonished the Commission to measure section 7 (c) applications by the standards explicated in **United States v. Carolina Carriers Corp.**, 315 U. S. 475 (1942), in con-

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(5) Frozen vegetables:

(A) From Philadelphia, Pennsylvania to Louisville, Kentucky and Charleston, West Virginia;

(B) From Bridgeville, Delaware to New Orleans, Louisiana and Jackson, Mississippi;

(C) From Memphis, Tennessee to Little Rock, Arkansas, Raleigh and Charlotte, North Carolina, and Exmore, Virginia;

(D) From Norfolk, Virginia to New Orleans, Louisiana and Jackson, Mississippi;

(E) From Searcy, Arkansas to points in New York and to New Haven, Connecticut, Watertown, Massachusetts, Baltimore, Maryland, Greensboro, North Carolina and Scranton and Philadelphia, Pennsylvania; and

(F) From Houston, Delaware to Memphis and Nashville, Tennessee and Houston, Texas;

(6) Coffee from New York, N. Y. to Chattanooga, Tennessee; and

(7) Bananas from New Orleans, Louisiana to Nashville, Tennessee.

[6] Winter Garden Co. v. United States, 211 F. Supp. 280 (E. D. Tenn., 1962); Jarman v. United States, 219 F. Supp. 108 (D. Md. 1963); Frozen Food Express v. United States, 219 F. Supp. 131 (N. D. Tex. 1963), and Hale Distributing Co. v. United States, 221 F. Supp. 266 (S. D. Calif. 1963).

struing the cognate provisions of section 206 (a) of the Motor Carrier Act of 1935 (49 U. S. C. A., § 306).

After the filing of the complaint herein, and before an answer had been filed by defendants, the Commission, on its own motion, issued an order, served December 16, 1964, authorizing plaintiff, within forty-five days, to file a petition for reconsideration specifying, by commodities and routes or territories, the additional authority to which it claimed to be entitled. Such a petition was filed on February 23, 1965 and the final report and order of Division 1, acting as an appellate division, was issued on August 19, 1965. This report and order, as modified by the order of December 10, 1965, granted plaintiff substantially greater authority than had previously been awarded,[7] but denied a portion of the authority sought.

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[7] The authority granted by the order of August 19, 1965, as modified by the order of December 10, 1965, is for the transportation, over irregular routes, of:

(1) Frozen fruits, frozen berries and frozen vegetables

(A) From points in the lower peninsula of Michigan to points in Texas, Nashville, Tennessee, Birmingham, Alabama, Jacksonville, Florida, New Orleans, Louisiana, Jackson, Mississippi, Tulsa and Oklahoma City, Oklahoma and points in that portion of Pennsylvania on and south of that portion of U. S. Highway 22 extending between the Ohio-Pennsylvania state line and Harrisburg, Pennsylvania and on and west of that portion of U. S. Highway 15 extending between Harrisburg and the Pennsylvania-Maryland state line;

(B) From points in Tennessee to points in Alabama, Florida, Mississippi, New York and to Little Rock, Arkansas, Atlanta, Georgia, Chicago, Illinois, Elkhart, New Orleans and Shreveport, Louisiana, Detroit, Michigan, Jersey city and Seabrook, New Jersey, Raleigh, Charlotte and Butner, North Carolina, Canton, Cleveland and Cincinnati, Ohio, Philadelphia and Pittsburgh, Pennsylvania, Houston, Texas, Exmore, Norfolk and Richmond, Virginia and Huntington, West Virginia.

(C) From points in New York to Birmingham, Alabama, Little Rock, Arkansas, Atlanta, Georgia, Greensboro,

It is conceded that the proceedings before the Commission have become administratively final.

North Carolina, Metairie and Shreveport, Louisiana, Charleston, South Carolina, and Memphis, Tennessee;

(D) From points in Maryland on and east of U. S. Highway 1 to Birmingham and Mobile, Alabama, and Albany and Atlanta, Georgia;

(E) From points in Virginia on and east of U. S. Highway 220 to points in North Carolina and Ohio, and to Mobile and York, Alabama, South Bend and Indianapolis, Indiana, Webster City, Iowa, New Orleans and Baton Rouge, Louisiana, Detroit, Michigan, Minneapolis, Minnesota, Jackson, Mississippi, Carnegie, Pennsylvania, Nashville, Tennessee and Charleston, West Virginia;

(F) From Seabrook, New Jersey to points in Georgia, Massachusetts, Ohio, Tennessee and Texas, and to Birmingham and Mobile, Alabama, Little Rock, Arkansas, Chester and Hartford, Connecticut, Panama City, Florida, Atlanta and Columbus, Georgia, Louisville, Kentucky, New Orleans, Louisiana, Cleveland, Ohio, Providence, Rhode Island, Burlington, Vermont and Charleston, West Virginia;

(2) Frozen fruits and frozen vegetables from Birmingham, Alabama to New Orleans, Louisiana and Memphis, Tennessee;

(3) Frozen vegetables:

(A) From Philadelphia, Pennsylvania to Louisville, Kentucky and Charleston, West Virginia;

(B) From Bridgeville, Delaware to New Orleans, Louisiana and Jackson, Mississippi;

(C) From Searcy, Arkansas to points in New York and to New Haven, Connecticut, Watertown, Massachusetts, Baltimore, Maryland, Greensboro, North Carolina and Scranton and Philadelphia, Pennsylvania; and

(D) From Houston, Delaware to Memphis and Nashville, Tennessee and Houston, Texas;

(4) Coffee from New York, N. Y. to Chattanooga, Tennessee;

(5) Bananas from New Orleans, Louisiana to Nashville, Tennessee; and

(6) Frozen seafood when moving in the same vehicle and at the same time with frozen fruits, frozen berries or frozen vegetables from Nashville, Tennessee to points in Alabama, Atlanta, Georgia and Indianola and Meridian, Mississippi.

Thus, it is to the opinion in **Carolina Carriers** that we turn for a statement of cardinal principles to be applied in arriving at a determination as to whether the Commission was justified in the restrictions which it placed on the geographical scope of plaintiff's operations with respect to areas of origin and destination, mightily labored in briefs and on oral argument.

Of peculiar pertinence to our inquiry is the following language abstracted from that opinion:

> "The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. **Alton R. Co. v. United States** [315 U. S. 15]. The Act provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. **McDonald v. Thompson**, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent service actually rendered may have been confined to narrow limits. **Loving v. United States**, 32 F. Supp. 464, aff'd 310 U. S. 609. . . . In addition, the Commission in determining the precise territory which may be served by a particular carrier, cannot be unmindful of its responsibility to coordinate the various transportation agencies which constitute our national transportation system [citations omitted].
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> . . .
>
> "As we indicated in **Alton R. Co. v. United States**, *supra*, the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior *bona fide* operations.' " 315 U. S. 480, 481. Accord, **Howard Hall Co. v. United States**, 315 U. S. 495 (1942).

With these criteria in mind we have carefully reviewed the whole record. We cannot say that, in weighing the specific evidence contained therein against the backdrop of the complexities of this transportation service, a process requiring the exercise of expert, empirical judgment, the Commission transgressed in imposing such geographical restrictions.

We are persuaded by the record in this case that the Commission gave due consideration to plaintiff's status and performance as a common carrier of a restricted number of commodities, the transportation characteristics and marketing pattern of the seasonal agricultural products involved, and the **demonstrated** ability of plaintiff to perform the services described in its application in placing restrictions on the articles which plaintiff may carry between the several points of origin and destination, as required by **Willis Shaw Exp. v. United States**, *supra*.

The Commission's report of August 19, 1965, contains an exhaustive analysis of the record evidence. Two examples of ultimate findings derived therefrom may be considered illustrative of its decisional process. With regard to sixteen Michigan origins, the Commission found that "the number of shipments of fruits and berries [before and after the critical date] is much larger than of vegetables" but concluded that "they have been handled as a single class from this territory and should not be separated in arriving at the scope of authority to be granted."[8] Moreover, the Commission pointed out that "[B]ecause of the numerous Michigan origins served, we conclude that the authority granted should be broadened to serve the Lower Peninsula of that State."[9] On the other hand, the Commission found that the only commodity transported by plaintiff from Philadelphia, Pa.,

[8] Comm. Rep., sheet 8.

[9] Comm. Rep., sheets 8-9.

as the point of origin, before and after May 1, 1958 had been frozen vegetables,[10] and concluded that its "grandfather" authority should accordingly be limited to that single commodity from such point.[11] This is a far cry from atomizing a carrier's prior service, product by product, so as to restrict the scope of its operations.[12]

We are convinced that the orders of the Commission, delineating the scope of "grandfather" authority to which plaintiff was entitled, are in accord with the applicable law and supported by substantial evidence of record. An order of dismissal will be entered herein.

Done, this the 27th day of June, 1966.

Walter P. Gewin,
Circuit Judge,

Seybourn H. Lynne,
District Judge,

H. H. Grooms,
District Judge.

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[10] Comm. Rep., App. B at sheets 56-57.

[11] Comm. Rep., sheet 19.

[12] An approach forbidden by United States v. Carolina Carriers Corp., 315 U. S. 475, 483 (1942).

APPENDIX B.

In the United States District Court for the Northern District of Alabama, Southern Division.

Colonial Refrigerated Transportation, Inc., Plaintiff, vs. United States of America and Interstate Commerce Commission, Defendants.	Civil Action No. 64-651.

In conformity with the opinion of the court contemporaneously entered herein:

It is Ordered, Adjudged and Decreed by the court that this action be and the same is hereby dismissed and that the costs of court incurred herein be and the same are hereby taxed against the plaintiff, Colonial Refrigerated Transportation, Inc.

Done, this the 27th day of June, 1966.

Walter P. Gewin,
Circuit Judge,

Seybourn H. Lynne,
District Judge,

H. H. Grooms,
District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 894

COLONIAL REFRIGERATED TRANSPORTATION, INC., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. B) dismissing in conformity with the court's opinion (J.S. App. A)[1] appellant's suit to set aside orders of the Interstate Commerce Commission in its Docket No. MC-115841 (Sub-No. 48), *Colonial Refrigerated Transportation,*

[1] The district court's opinion is reported at 255 F. Supp. 999.

Inc., Common Carriers "Grandfather" Application. The basic issue is the validity of the Commission's partial denial of the application of appellant for motor-carrier "grandfather" authority under Section 7(c) of the Transportation Act of 1958, 72 Stat. 573, 49 U.S.C. following 303(b)(6), to transport certain frozen commodities.[2]

On December 8, 1958, Colonial Refrigerated Transportation, Inc., filed an application for "grandfather" authority to transport frozen fruits, berries, and vegetables, coffee beans, and bananas, in straight loads and in mixed loads with frozen seafood and frozen poultry, from points in 27 States to points in 39 States and the District of Columbia (J.S. App. A, pp. 21-22). After full administrative proceedings, the Commission found that Colonial Refrigerated Transportation, Inc., had established *bona fide* "grandfather" operations from, to, and between certain points, and authorized issuance of a certificate substantially more limited than that sought (J.S. App., p. 23, n. 5). Several petitions for further consideration of the limited grant of authority were denied by the Commission.

On November 3, 1964, appellant filed its original complaint in this court proceeding. However, before filing its answer, the Commission on its own motion

[2] In *Battaglia* v. *United States*, *per curiam*, No. 564, O.T., November 21, 1966, and in *Exley Express, Inc.* v. *United States*, *per curiam*, No. 644, O.T., December 12, 1966, a similar issue was presented in respect to frozen fruit, frozen berries, and frozen vegetables. In the former the Commission denied in part the motor carrier's application while in the latter, as here, it substantially granted the application.

allowed appellant to file a petition for reconsideration within 45 days, specifying by commodities, routes, and territories the additional authority to which it claimed to be entitled. In its subsequent report on reconsideration, the Commission concluded that, applying the standards established under this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, appellant was in fact entitled to broader authority than had previously been awarded, but not to the full extent claimed in its petition (J.S. App., p. 25, n. 7).

On appeal, the district court found that "the orders of the Commission delineating the scope of 'grandfather' authority to which plaintiff [appellant] was entitled, are in accord with the applicable law and supported by substantial evidence of record" (J.S. App., p. 29).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the "grandfather" clause of Section 7(c) were fully considered and determined by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, *supra*. Like the *Battaglia* and *Exley* cases (*supra*, n. 2), this appeal involves only the application of those standards to particular circumstances.[3]

[3] The *Shaw* decision and the Commission's actions thereunder are discussed in the motion to affirm filed by the United States and the Interstate Commerce Commission in *Battaglia* v. *United States*, No. 564, O.T. 1966, pp. 4–5.

The authority granted appellant by the Commission achieved substantial parity with its prior *bona fide* operations, and was properly sustained by the court below. The district court fully implemented the applicable law as defined by this Court in *Shaw* and *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 (J.S. App., pp. 27–28). Thus, referring to the specific criteria stated by this Court in *Shaw*, the lower court found (J.S. App., p. 28):

> We are persuaded by the record in this case that the Commission gave due consideration to plaintiff's status and performance as a common carrier of a restricted number of commodities, the transportation characteristics and marketing pattern of the seasonal agricultural products involved, and the *demonstrated* ability of plaintiff to perform the services described in its application in placing restrictions on the articles which plaintiff may carry between the several points of origin and destination, as required by *Willis Shaw Exp.* v. *United States, supra.*

The district court noted that "[t]he Commission's report of August 19, 1965, contains an exhaustive analysis of the record evidence" (J.S. App., p. 28). Referring to this Court's prior decision in *Carolina Carriers, supra,* the court held that the authority granted appellant by the Commission "is a far cry from atomizing a carrier's prior service, product by product, so as to restrict the scope of its operations" (J.S. App., p. 29).

The precise scope of an individual carrier's "grandfather" right under Section 7(c)—a subject of con-

tinuing litigation'—always turns on the particular facts of the case. Here the correct standard was applied to the partciular circumstances of this record. There is no occasion for further review.

'Subsequent to this Court's decision in *Shaw*, seven Section 7(c) cases have been filed in the district courts. In two such cases the Commission decision has been sustained: *Battaglia* v. *United States*, *supra*, n. 2, and *Exley Express, Inc.* v. *United States*, *supra*, n. 2; in two cases the Commission decision was reversed: *Willis Shaw Frozen Express, Inc.* v. *United States*, 256 F. Supp. 257 (W.D. Ark.), and *Winter Garden Co.* v. *United States*, Civil Action No. 5457 (E.D. Tenn.); and three cases are still pending: *Lester C. Newton Trucking Co.* v. *United States*, Civil Action No. 2508 (D. Del.); *W. W. Hughes* v. *United States*, Civil Action No. 41335 (E.D. Pa.); and *Trans-Cold Express, Inc.* v. *United States*, Civil Action No. 3–1558 (N.D. Tex.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
WILLIAM R. WEISSMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
NAHUM LITT,
Attorney,
Interstate Commerce Commission.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

COLONIAL REFRIGERATED TRANSPORTATION, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 894. Decided March 27, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.